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April 28, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Ex parte Presentation in CS Dkt. No. 95-184.

Dear Mr. Caton:

I am hereby submitting an original and two copies of this notice of the Independent Cable & Telecommunications Association ("ICTA") of two *ex parte* presentations in the above-referenced docket.

On April 17, 1997, Bill Burhop, Executive Director of ICTA, and Deborah Costlow, ICTA's outside General Counsel, met with Anita Wallgren, Legal Advisor to Commissioner Ness. On April 22, 1997, Ms. Costlow, again in her capacity as ICTA's outside General Counsel, met with Marsha MacBride, Legal Advisor to Commissioner Quello.

In these meetings, the parties discussed the jurisdictional and policy issues surrounding movement of the demarcation point for MDUs. ICTA restated its firm belief that the Commission has the statutory authority to move the demarcation point to that point where the wire is dedicated to an individual unit in a multiple dwelling building or complex. However, ICTA also set forth an alternative procedural mechanism which it urged the Commission to adopt should the Commission decide that it lacks the authority to move the demarcation point. This compromise plan was described in ICTA's April 16, 1997 notice of separate *ex parte* presentations in this docket to officials with the Cable Services Bureau and Legal Advisors to Commissioner Chong and Chairman Hundt.

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The parties also discussed the machinations that incumbent providers frequently engage in as the expiration of their service contract and the transition to a new provider approaches. ICTA explained that the incumbent typically will not agree to a sale of the inside wiring and very often will not give the property owner or new provider any firm indication of whether it intends to remove the wiring and restore the property, or abandon the wiring in its current state. Often the incumbent will disable the wiring by cutting it up, rendering it useless for any provider. Without knowing how the incumbent is going to proceed, the new provider is more often than not forced to install new wiring or risk an interruption of service if the incumbent removes or disables the wiring after termination. In too many instances, the incumbent actually engages in activities suggesting that it will remove the wiring, or in some instances, explicitly states as such. It then stands by as the new provider overbuilds the system, only to leave the wiring intact upon expiration of its contract and after the new provider has expended significant resources on the overbuild and narrowed its operating margins. ICTA notes that unless a contract specifically provides the incumbent with the right to leave its wiring in place after termination of its access rights without legally abandoning the wiring, which is extremely rare, the incumbent will commit a trespass if it does not sell, remove or legally abandon the wiring upon termination. See, e.g., Centel Cable Television Co. of Florida v. Thomas J. White Development Corp., 902 F.2d 905, 911, n.13 (11th Cir. 1990) (installation of cable outside area where access is authorized constitutes a trespass).

ICTA maintained that its compromise plan would forestall the maneuvering described above by requiring an incumbent to give notice to the owner prior to conversion of what the incumbent will do with the wiring after its termination. ICTA argued that this new-found certainty regarding disposition of the inside wiring would greatly increase order and efficiency in the marketplace and promote full and fair competition among providers as existing contracts expire. ICTA pointed out that the compromise plan simply requires the incumbent to decide on specified dates prior to its termination what action it will take after termination.

ICTA also explained that a fixtures analysis under applicable state law does nothing to provide the certainty that is required for an efficient and competitive marketplace. The fixtures law of each state relies upon a substantially similar three-part standard based upon annexation of the chattel to the property, adaptation of it to the use of the property and the intent of the annexor. However, as is evident from the caselaw, there is more than enough flexibility in that standard to permit courts to reach different answers to the question of whether a prewire or postwire system is a fixture. Thus, predictions regarding how a particular court will rule in a fixtures analysis are inherently unreliable. An owner or new provider cannot rely upon such predictions in deciding whether to overbuild the system or to utilize the existing wiring and risk a lawsuit for conversion. Indeed, very few cases regarding the status of MDU wiring have been litigated since the property owner and new provider rarely can risk the damages that might be awarded to the incumbent if it is

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successful in a conversion action. Those damages could include punitive as well as compensatory damages. It is also possible that a court would find that the conduct supports a claim of tortious interference, which could result in liability for damages based upon the incumbent's lost revenue.

Faced with the possibility of such far-reaching liability, and given that the attorney fees involved in defending such an action can alone exceed the cost of installing new wiring, property owners and new providers rarely risk a conversion action. Knowing this, the incumbent often threatens to bring such a case even if it in fact believes the wiring to be a fixture. In addition, many incumbents are willing to initiate a conversion action with little consideration of its merits since they are faced only with the risk that they will not recover the attorney fees incurred if they are unsuccessful, and are not faced with the possibility of being found liable for extensive damages as is the case with the property owner and new provider. For all of these reasons, reliance upon state fixtures law cannot alleviate the uncertainty or prevent the scheming that are currently hindering competition in this market.

Finally, the parties discussed the fact that franchised cable operators typically include in their service contracts provisions stating that after expiration or termination of the contract, they retain ownership of the wiring they have installed (see Exhibit A). Private operators, on the other hand, usually include language acknowledging that the wiring they install becomes a fixture upon installation, or include terms providing for the sale of the wiring to the property owner for a nominal sum after expiration of the contract (see Exhibit B).^{1/}

Sincerely,



Treg Tremont

cc: Rick Chessen
Julius Genachowski
Marsha MacBride
Suzanne Toller
Anita Wallgren

^{1/} For both Exhibits A and B, we have simply excerpted the specific contractual provisions regarding ownership of the wiring in order to alleviate confidentiality concerns.

EXHIBIT A

Sample Ownership Provisions From Contracts of Franchised Cable Operators

- Owner/builder agrees that all lines, appliances, converters and other equipment installed by [Cable Operator] will remain the sole property of [Cable Operator], and that such lines, appliances, converters and other equipment and their installation shall be used exclusively for the reception of [Cable Operator] CATV system. [Cable Operator] shall, nevertheless, retain the right to provide any other related service using all such lines, appliances, converters and other equipment. Any unauthorized use of such lines, appliances, converters and other equipment by owner/builder or with owner/builder's consent or knowledge shall make owner/builder liable to [Cable Operator] for additional costs and fees based upon the then current costs of material. [Cable Operator] shall have the right to conduct any and all necessary inspections and audits to determine unauthorized use of all such lines, appliances, converters and other equipment. The cost of any inspections, audits, changes, replacements or repairs made necessary by the loss, misuse, abuse, theft, fraud or tampering of any such lines, appliances, converters and other equipment shall be the obligation of owner/builder or subscriber/resident, as the case may be. The exclusive nature of this agreement pertains solely to the use of [Cable Operator]'s lines, appliances, converters and other equipment installed by [Cable Operator].
- Ownership of the System. Owner agrees that all equipment and wires installed by Cable TV shall remain the property of Cable TV, and may be removed in whole or in part, within thirty (30) days following the expiration or earlier termination of this Agreement, provided Cable TV promptly repairs any damage to the Project caused by such removal.
- Company shall design, construct, install and maintain a communications transmission system on the Property which will provide Basic Service of a good and reasonable quality (such system or any parts thereof, together with any outlets, wires, or other equipment and materials Company deems necessary and installs at any time at the Property to provide the Basic or Premium Service, is hereinafter referred to as the "System"). Title and ownership to all of the System shall at all times be and remain vested in Company. At the expiration or other termination of this Agreement, Company may remove all or any part of its System from the Property.

EXHIBIT B

Sample Ownership Provisions From Contracts of Private Cable Operators

- **Final Disposition of the Equipment.** Upon the expiration or termination of this Agreement for any reason, Operator shall convey to Owner all right, title and interest in and to all cable wiring and conduit not currently owned by Owner free and clear of all liens and encumbrances for the total sum of \$1.00. All other equipment, including any satellite antennas, off-air antennas, and Equipment contained within the head-end facility, shall either (1) be abandoned by Operator within fifteen (15) days of such expiration or termination whereupon Owner may sell, assign, transfer, remove or otherwise utilize such equipment as Owner deems appropriate at Owner's sole election; or (2) be removed by Operator within thirty (30) days of such expiration or termination, and the Property restored to a condition substantially equivalent to the condition existing prior to such removal. If Operator elects to remove under subsection (2) directly above but fails to complete the restoration work within such thirty (30) day period, Owner shall have the right to remove any remaining Equipment, and to restore the Property to its original condition, and Operator shall reimburse Owner for the full amount expended in such removal and restoration immediately after Owner's request therefor.
- With the exception of control boxes and any satellite receiving dish antennae, all Equipment installed on the Property shall be deemed to be the property of Owner immediately upon installation. Control boxes and any satellite receiving dish antennae shall be deemed to be the property of Operator; provided, however, that if Operator does not remove any control boxes or satellite receiving dish antennae from the Property within thirty (30) days after termination of this Agreement, then such control boxes and satellite receiving dish antennae shall be deemed to be the property of Owner.
- **Disposition of System Upon Termination.** Upon termination or expiration of this Agreement, OWNER and COMPANY shall mutually determine Fair Market Value of the System. Provided OWNER is not in default under the terms hereof, OWNER shall have the option for thirty (30) days after termination or expiration of this Agreement to purchase the System from COMPANY for the Fair Market Value and in the event OWNER exercises such option, COMPANY shall execute all documents necessary to evidence the conveyance. In the event Owner does not exercise its option to purchase, COMPANY shall have the right, for a period of sixty (60) days after the date of termination or expiration, to remove the System from the Property. COMPANY shall repair any damage to the Property resulting from the removal of the System. Any of the System remaining in the Property, including all wiring, after the expiration of sixty (60) days from termination or expiration of the Agreement shall become the property of OWNER.